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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMU MURRY,

Defendant and Appellant.

B289380

(Los Angeles County
Super. Ct. No. YA096973)

APPEAL from judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Affirmed.

James Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Damu Murry appeals the judgment entered following a jury trial in which he was convicted of two counts of felony resisting an executive officer in violation of Penal Code¹ section 69 (counts 5 and 6). The trial court found true the allegation that appellant had suffered one prior serious or violent felony conviction under the Three Strikes law. (§§ 667, subds. (b)–(j), 1170.12, subd. (b).) The trial court denied appellant’s motion to dismiss the prior strike allegation and sentenced him to a term of four years in state prison. Appellant contends the trial court committed reversible error in denying appellant’s *Batson/Wheeler*² motion as to the prosecutor’s peremptory challenge against the sole African-American in the jury venire. We disagree and affirm.

FACTUAL BACKGROUND

On September 29, 2017, around 8:30 p.m., Los Angeles Sheriff’s Deputies Ryan Beck and Matthew Seno responded to a 911 report of a man hitting a woman who was lying in the street. The caller identified appellant as the man involved in the assault.

¹ Undesignated statutory references are to the Penal Code.

² “*Batson/Wheeler*” is the shorthand for *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), which define the procedure that “guide[s] trial courts’ constitutional review of peremptory strikes” (*Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*)) in determining “whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds” (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*)).

As Deputies Beck and Seno attempted to detain appellant, he raised a stick over his shoulder in a threatening manner. Ignoring orders to put down the stick, appellant advanced toward the officers. Deputy Beck then “tased” appellant, causing him to fall to the ground. Despite further resistance, appellant was handcuffed and taken into custody.

DISCUSSION

The Trial Court Did Not Err in Denying Appellant’s *Batson/Wheeler* Motion

A. Relevant background

Prospective Juror Nos. 0189 and 8433 were the only African-Americans in the jury venire in this case. Defense counsel did not oppose the prosecutor’s for-cause challenge against Prospective Juror No. 0189. The trial court excused Prospective Juror No. 0189 for cause because she “clearly stated she cannot be a fair juror.” The prosecutor used his next peremptory challenge against Prospective Juror No. 8433, prompting a defense *Batson/Wheeler* motion.

Prospective Juror No. 8433, an engineer whose ex-husband was a corporate attorney, had previously served on a civil jury which had reached a verdict. She reported that she had relatives who had been charged with crimes. Her brother, who has mental health and drug issues, had been accused of “a variety of minor crimes, nothing violent.” Her father, a doctor, was accused of writing illegal prescriptions. She also had cousins who had been in jail, but she did not know why.

In response to the trial court’s question about whether she felt her family members had been treated fairly by the criminal justice system, Prospective Juror No. 8433 said, “For the most part. There were some minor things that—well, my father’s case,

I think my problem is actually with the attorney. I thought he had bad advice. [¶] . . . [¶] He had another attorney on appeal that did do a good job.” The trial court asked, “Is there anything about what your father went through or [what] any of your relatives went through that would affect the way you see the evidence in this case?” Prospective Juror No. 8433 responded, “No. I’ve had enough from both sides to know they can be wrong on both sides.” The court then asked, “Can you be a fair juror?” The prospective juror answered, “Yes.”

In response to questioning by defense counsel, Prospective Juror No. 8433 stated that she would not hold her father’s bad experience with his lawyer against either of the attorneys in this case, explaining, “I know that doesn’t represent all attorneys.” When the prosecutor asked if her brother’s mental health issues and contact with police had “changed [her] opinion on how police officers should interact” with people, Prospective Juror No. 8433 answered, “I think they should be trained to interact with people who have mental health issues.” The prosecutor then asked, “[Would that affect] your opinion as to whether an officer acted appropriately or inappropriately if he came to those conclusions?” Prospective Juror No. 8433 responded, “No. I mean, I think that sometimes they get it right and sometimes they get it wrong. I don’t think I would trust them just because they’re a police officer, and I wouldn’t distrust them for that either.”

In support of the *Batson / Wheeler* motion, defense counsel noted that Prospective Juror No. 8433 “said she could be fair and impartial,” and pointed out that she was the only remaining African-American on the panel. The trial court found that appellant had made a *prima facie* showing of discrimination and

asked the district attorney to explain his reasons for excusing this prospective juror.

The prosecutor explained: “[Prospective Juror No. 8433] indicated that her brother was—who had mental health issues didn’t like the way in which the police treated him. I believe that testimony may come out indicating the way in which Mr. Murry was acting which may potentially lead a juror to think he may have some sort of mental health issues. I don’t want her to put that on the People. [¶] She also said her father had illegal prescription cases against him and didn’t like the way the—I have written she had problems with the criminal justice system.”

Accepting the district attorney’s explanation as race-neutral, the trial court denied the *Batson/Wheeler* motion.

B. Legal principles

“Peremptory challenges are ‘designed to be used “for any reason, or no reason at all.” ’ ” (*People v. Armstrong* (2019) 6 Cal.5th 735, 765 (*Armstrong*)). But they are not without limits. “ ‘Both the federal and state Constitutions prohibit any advocate’s use of peremptory challenges to exclude prospective jurors based on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.’ ” (*People v. Parker* (2017) 2 Cal.5th 1184, 1210–1211 (*Parker*); *People v. Scott* (2015) 61 Cal.4th 363, 383.) “Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal.” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) There is, however, “ ‘a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden

is on the opposing party to demonstrate impermissible discrimination.’ ” (*Parker*, at p. 1211; *Armstrong*, at p. 766.)

Our Supreme Court has explained that “[t]o assess whether such prohibited discrimination has occurred, our inquiry under *Batson/Wheeler* follows three distinct, familiar steps. First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. (*Johnson*[, *supra*, 545 U.S. at p.] 168.) Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike. (*Ibid.*) Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike. (*Ibid.*)” (*People v. Reed* (2018) 4 Cal.5th 989, 999.)

However, “[t]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613; *Parker*, *supra*, 2 Cal.5th at p. 1211.)

This case concerns the third step of the *Batson/Wheeler* inquiry; that is, whether the trial court correctly determined that the prosecutor had not engaged in purposeful discrimination in exercising his peremptory challenge to exclude the only African-American in the jury venire. The trial court’s finding on discriminatory intent is “‘a pure issue of fact’ ” to which we apply a substantial evidence analysis. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339; *People v. Hamilton* (2009) 45 Cal.4th 863, 900.)

At the third stage of the inquiry, the moving party “must show it was ‘ “more likely than not that the challenge was improperly motivated.” ’ [Citation.] This portion of the

Batson/Wheeler inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness.” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) “The prosecutor’s ‘justification need not support a challenge for *cause*, and even a ‘trivial’ reason, if genuine and neutral, will suffice.” [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.’” (*People v. O’Malley* (2016) 62 Cal.4th 944, 975.) The sole concern at this stage is that the reason for exercising the peremptory challenge was sincere and legitimate, that is, nondiscriminatory. (*Ibid.*)

The Supreme Court has observed that the critical question in determining whether a defendant has shown purposeful discrimination at step three “is the persuasiveness of the prosecutor’s justification for his peremptory strike. At this stage, ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ [Citation.] In that instance the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 338–339; *Gutierrez, supra*, 2 Cal.5th at p. 1158.)

We start with the presumption that “an advocate’s use of peremptory challenges occurs in a constitutional manner.” (*Gutierrez, supra*, 2 Cal.5th at p. 1159.) “Because the trial court’s credibility determination may rest in part on contemporaneous observations unavailable to the appellate court, we review that determination ‘ “with great restraint.” ’” (*Armstrong, supra*, 6

Cal.5th at pp. 767–768; *Gutierrez*, at p. 1159.) The Supreme Court has recognized that such assessments of credibility and demeanor lie peculiarly within the province of the trial judge, and in the absence of exceptional circumstances, an appellate court should defer to the trial court’s determination. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) Such “[d]eference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. ‘[I]f an appellate court accepts a trial court’s finding that a prosecutor’s race-neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor’s explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review.’ ” (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 339–340.)

C. Analysis

Appellant maintains that, because the prosecutor mischaracterized the prospective juror’s statements, the explanation for the People’s peremptory challenge against Prospective Juror No. 8433 is not supported by the record. We find no error in the trial court’s determination that the prosecutor’s stated nondiscriminatory reasons, which were based upon reasonable inferences from the prospective juror’s answers, were genuine. Deferring to the trial court’s credibility determination, we therefore conclude the court properly denied appellant’s *Batson/Wheeler* motion.

The district attorney explained that there would likely be evidence at trial that appellant’s mental health issues played a part in his interactions with police that lead to the charges

against him. Given such evidence, the prosecutor was reasonably concerned that Prospective Juror No. 8433's views on the adequacy of police training regarding interactions with people suffering from mental health problems might influence her view of the People's case. In addition, the juror's responses to questions about her father's criminal prosecution prompted the district attorney to infer that the juror "had problems with the criminal justice system." Even if the prosecutor's interpretation of the juror's responses was not entirely accurate, the explanation does not demonstrate purposeful discrimination. "Where the record suggests that a mistake may underlie the prosecution's exercise of a peremptory challenge, 'we rely on the good judgment of the trial courts to distinguish bona fide reasons . . . from sham excuses belatedly contrived to avoid admitting acts of group discrimination,' 'and 'give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 78.)

Contrary to appellant's claim, the record supports a reasonable inference that this prospective juror was skeptical of the police, particularly regarding police interactions with people having mental health issues, and that the criminal justice system may not always treat people fairly. Such expressions provide a "self-evident" and race-neutral justification for striking a prospective juror, requiring no further explanation. (*Gutierrez, supra*, 2 Cal.5th at p. 1171 ["a peremptory challenge may be based on a broad range of factors indicative of juror partiality, even those which are ' "apparently trivial" ' or ' "highly speculative" ' "].) It was up to the trial court to assess the genuineness of the prosecutor's concerns, and we find no basis to

overturn the trial court's determination that the prosecutor had offered a legitimate nondiscriminatory reason to excuse Prospective Juror No. 8433.

DISPOSITION

The judgment is affirmed.

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LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.